No. 6177.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
KEIZO KAMIYAMA
For a Writ of Habeas Corpus.

Keizo Kamiyama,
Appellant,

vs.

Walter E. Carr, District Director,
United States Immigration Service,
Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

This is an appeal from an order discharging a writ of *habeas corpus* and remanding Keizo Kamiyama to the custody of the United States Immigration Service for deportation. [Transcript of Record, page 19.]

The original record of the Department of Labor, Immigration Service, has been filed with the clerk of

this court pursuant to an order of the District Court. [Transcript of Record, page 27.]

Throughout this brief we will refer to this record as the "Immigration File." The printed transcript of the proceeding in the District Court will be referred to as "Transcript of Record."

Keizo Kamiyama, appellant herein, is an alien, a citizen of Japan and of the Japanese race. He will be referred to throughout this brief as the alien. The alien was found by immigration officers near Venice, California, on or about November 16, 1928, without documentary evidence in his possession showing his right to be and remain in the United States. He was conveyed to San Pedro, California, where on the following day he was given a hearing relative to his presence in the United States and on the same date at conclusion of the hearing a telegraphic application for a warrant for the alien's arrest was made to the Secretary of Labor at Washington, D. C. November 17, 1928, fell on Saturday. Telegraphic warrant of arrest issued by the Secretary of Labor was dated the following Monday, to wit: November 19, 1928. The warrant provided for release of the alien under bond. Bond was executed and he was released on November 21, 1928, pending further action in his case. On January 25, 1929, formal hearing under the warrant was instituted at which time the alien was represented by Attorney J. Edward Keating of Los Angeles, California. At that hearing the evidence upon which the warrant of arrest had been issued was presented to the alien and his counsel, at which time certain additional Govern-

ment exhibits were introduced and at which time certain exhibits were introduced in evidence in behalf of the alien. At the conclusion of the hearing of January 25, 1929, the matter was further continued and was resumed on March 13, 1929, that being the time agreed upon by all parties. At conclusion of the continued hearing, it was found by the examining inspector that the alien is a native and citizen of Japan and of the Japanese race, and that he entered the United States from Mexico near Calexico, California, subsequent to July 1, 1924. Upon the evidence submitted the Secretary of Labor caused his warrant to be issued on June 21, 1929, directing return of the alien to Japan on the grounds that he was subject to deportation under section 19 of the Immigration Act of February 5, 1917, being deportable under the provisions of a law of the United States, to wit:

> "The Immigration Act approved May 26, 1924, in that he was not, at the time of his entry, in possession of an unexpired immigration visa; and that he is an alien ineligible to citizenship and not exempted by paragraph (c), section 13 thereof, from the operation of said act."

Appellee was preparing to return the alien to Japan in accordance with the terms of the warrant when *habeas corpus* proceedings were instituted. [Transcript of Record, page 10.] The matter came on for hearing and on the 3rd day of March, 1930, the District Court discharged the writ of *habeas corpus* and remanded the alien to appellee's custody for deportation. [Transcript of Record, page 19.] Thereafter on the 26th day of May, 1930, notice of appeal was filed. [Transcript of Record, page 24.]

ARGUMENT.

It is the contention of appellees that the facts and the law justify the issuance of the above order of deportation. In reaching this conclusion however there are four questions which must be determined. They are:

1. Is this alien Keizo Kamiyama?

2. Has the alien established that he was in the United States prior to July 1, 1924?

3. Was the hearing which resulted in the order of deportation a fair hearing?

4. Is there evidence to sustain the warrant of deportation?

We will discuss these questions in the order stated.

(1) Is This Alien Keizo Kamiyama?

Appellee contends that the alien herein is not Keizo Kamiyama. The evidence indicates that a Japanese alien named Keizo Kamiyama was in the United States prior to July 1, 1924. His residence here may have been legal or at least of such duration that his deportation is no longer possible. Appellee believes that the alien herein knew of this Keizo Kamiyama, by some means secured certain papers belonging to the latter, and assumed the identity of the real Keizo Kamiyama, at least insofar as immigration matters were concerned. Aside from the fact that one or two Japanese have known the alien by the name of Keizo Kamiyama, the only evidence tending to establish that the alien is Keizo Kamiyama is the alien's own testimony; certain letters and other papers bearing the name of Keizo Kamiyama; and the alien's exhibit No. 3: "Japanese Who's Who in

America." With reference to these exhibits filed by the alien he was asked on page 9 of the hearing of January 25, 1929, appearing in the Immigration File whether he could produce any evidence identifying him as the Keizo Kamiyama whose name appeared on the documents in question. The alien replied that he could not. In order therefore to determine whether the exhibits referred to the alien, it is necessary to rely entirely upon the testimony of the alien himself. As far as the letters and receipts are concerned, they contain nothing of descriptive nature to establish that they are in fact the property of this alien and would be of equal value to identify any person in whose hands they might fall who claimed that his name was Keizo Kamiyama. The only exhibit therefore throwing any light upon the identity of the alien is his Exhibit No. 4. The exhibit in question shows that the Keizo Kamiyama therein mentioned was from Hagoshime-ken, Japan (see page 3 of the alien's hearing of January 25, 1929, in Immigration file). On page 1 of the hearing of November 17, 1928, in the same file, the alien claimed under oath and through an interpreter that he was born in Yoshimamura, Wakayana-ken, Japan. Here is a direct conflict. On page 8 of the hearing of January 25, 1929 (see Immigration file), when confronted with this discrepancy the alien attempted to explain this discrepancy and to make it appear that he was in fact born at the place indicated in his Exhibit No. 4. Appellee contends that this explanation is untenable.

Another discrepancy between the testimony of the alien and his Exhibit No. 4 is concerning the alien's age. The exhibit indicates that the Keizo Kamiyama therein

mentioned was born August 8th, Meiji 27 (1894). On January 25, 1929, when the alien made his statement, the real Keizo Kamiyama would have been about 35½ years old. On page 1 of the alien's hearing of November 17, 1928, he testified under oath through an interpreter that he was 37 years old. Twice he reiterated that statement. The record of that hearing indicates that the alien was uncertain whether he was born in the Japanese year Meiji 28 (1895) or Meiji 25 (1892), but there was no uncertainty about his age being 37 years. When in his hearing of January 25, 1929, he was confronted with this discrepancy (see testimony of pages 8 and 9 in Immigration File), the alien admitted that he was 25 years old Japanese reckoning and 24 years old by American reckoning, and that he was born in the Japanese year Meiji 37 (1904) thus. making him about 10 years younger than the age of the Keizo Kamiyama mentioned in the aliens' Exhibit No. 4. Appellee believes that the age of the Keizo Kamiyama mentioned in said Exhibit No. 4 is correct and in support of this theory refers to the testimony in Government's Exhibit "C" in Immigration File comprising the testimony of M. Suruki given under date of November 23, 1928. In that testimony the witness stated that the Kamiyama he knew was "about 32 or 33 years old." We refer also to the testimony of Mrs. M. Suruki appearing on page 2 of statement of November 23, 1928, in Immigration File, which is part of Government Exhibit "C." In that statement the witness testified that Keizo Kamiyama was "32 to 35 years." On November 23, 1928, witness K. Nishamoto testified (page 5 Government said Exhibit "C") that the Kamiyama he

knew was "over 35 years he was older than I." The testimony of the above witnesses as to the apparent age of Keizo Kamiyama supports the evidence appearing in the alien's Exhibit No. 3 that the Keizo Kamiyama therein mentioned was in fact more than 35 years of age. In giving his present testimony that he is only 24 years of age the alien is compelled to impeach the evidentiary value of his own exhibit and thus is left without any documentary evidence tending to establish his identity.

It is further noted from page 5 of the hearing of January 25, 1929, in Immigration File, that the alien never registered with the Japanese consul during all the years of his alleged residence in and around Los Angeles. If the alien actually entered the United States on February 13, 1920, and has resided here ever since that date; if he is well enough known to be mentioned in the Japanese "Who's who in America," he should be able to produce many witnesses to testify that they had known him here. The absence of such testimony, and the discrepancies as to place of origin and time of birth, discredit the alien's claim that he is the Keizo Kamiyama who resided in the United States prior to July 1, 1924.

(2) Has the Alien Established That He Was In the United States Prior to July 1, 1924?

Appellee contends that no proof that this alien was in the United States prior to July 1, 1924, has been offered. In his hearing of November 17, 1928, on page 1 thereof (see Immigration File) the alien testified that in May, 1919, he proceeded from Japan to Mexico on

the ss. "Siberia Maru." When advised in that hearing that the local agents of the steamship in question and the Immigration Service records indicated that the "Siberia Maru" did not go to Mexico in 1919, the alien said "I am telling the truth." At the hearing of January 25, 1929 (page 4 in said file) the Government introduced into evidence a letter from the NYK steamship line dated November 30, 1929, indicating that the vessel in question had not visited Mexico in 1919. Counsel for the alien made no objection to the introduction of this evidence which refuted the claim of the alien. From this it is seen that the alien did not enter Mexico on the vessel claimed by him and discredits his testimony as to such entry.

Another feature that raises a doubt as to length of residence of the alien in the United States is this: His testimony on page 5 of his hearing of January 25, 1929 (Immigration File), indicates that he is 24 years old American reckoning. He claims to have left Japan in 1919 for Mexico. (See page 1 of the alien's statement of November 17, 1928 in Immigration File.) That would make him about 14 years old at the time he left Japan for Mexico. On page 11 of the hearing of January 25, 1925, the alien testified "I have no brother." Therefore, the alien is the only son of his father and mother, who, according to testimony on page 1 of the hearing of November 17, 1928, still reside in Yoshi Namura, Wakayana, Japan. While it is possible, yet it hardly seems probable, that parents would permit an only son of such tender years to leave his home and proceed half way around the world to a foreign land, the language of which he could not speak and with the conditions of which he

could not have been familiar. The proven fact that the alien did not reach Mexico on the ship that he swore conveyed him there and the improbable story of his arrival in Mexico when about 14 years of age discredits his testimony concerning his arrival there and throws grave doubt upon the truth of his statement that he entered the United States from Mexico in 1920.

To escape deportation the alien must show that he entered the United States prior to July 1, 1924. Section 31 (c) of the Immigration Act of 1924 (43 Stat. 153) provides:

> "If an alien arrived in the United States before July 1, 1924, his right to admission shall be determined without regard to the provisions of this act except section 23."

Section 23 of the Act provides in part:

> "* * * in any deportation proceeding against any alien the burden of proof shall be upon such alien to show that he entered the United States lawfully and the time, place, and manner of such entry into the United States, but in presenting such proof he shall be entltled to the production of his immigration visa, if any, or of other documents concerning such entry, in the custody of the Department of Labor."

The alien herein admits unlawful entry into the United States and manifestly, therefore, he cannot show lawful entry; but inasmuch as he claims entry prior to July 1, 1924, under the section above cited, the burden still rests upon him to show that he did in fact enter the United States prior to that date. Failing in this he has

not met the burden of proof placed upon him by section 23, and the presumption is that he entered this country subsequent to July 1, 1924.

Section 14 of the Immigration Act of 1924 provides in part as follows:

> "any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this act to enter the United States * * * shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917."

In enacting the above section we must assume that Congress was cognizant of the fact that with the removal of the time limit within which deportation must be carried out as to persons entering the United States subsequent to July 1, 1924, some aliens unquestionably would claim that they entered the United States prior to the effective date of the section in question. Consequently section 23 of the Act, *supra,* places squarely upon the alien whose deportation is sought the burden of showing that he entered the United States prior to July 1, 1924. The use of the words "except section 23" as they appear in section 31 (c) of the Act of 1924, clearly indicates the intent of Congress.

It is appellee's contention that the alien has not established that he was in this country prior to July 1, 1924, and in view of that fact appellee believes this appeal should be dismissed and appellant remanded for deportation provided, of course, the hearing which resulted in the order of deportation was fair.

(3) Was the Hearing Which Resulted In the Order of Deportation a Fair Hearing?

It is appellee's contention that the hearing which resulted in the order of deportation was fair. While the alien was not represented by Counsel at the preliminary hearing of November 17, 1928, he was represented by counsel at subsequent hearings and associate counsel appeared before the board of review in Washington in behalf of the alien. The mere fact that an alien is not represented by counsel in a preliminary examination does not constitute unfairness, if it appears that before the record is transmitted to the Secretary of Labor for decision the alien is represented by counsel. (See Plane v. Carr C. C. A. 9th Circuit 19 Fed. (2nd) 470, and *Ex Parte* Ematsu Kishimoto C. C. A. 9th circuit 32 Fed. (2nd) 991.) In the conduct of the hearing in the case at bar the rules of the Department of Labor were followed and it is believed an examination of the record will indicate that fairness prevailed throughout the entire proceeding.

(4) Is There Evidence to Sustain the Warrant of Deportation?

Appellee contends that there is sufficient evidence to sustain the deportation order in this case. The warrant of deportation charges that the alien "was not, at the time of his entry, in possession of an unexpired immigration visa." No immigration visa has been produced nor can one be produced in view of the fact that the alien herein admits entering the United States without inspection. It is apparent therefore that this specific charge is supported by the record.

The next charge is that the alien "is an alien ineligible to citizenship." He is of the Japanese race and is therefore ineligible to citizenship (*Takeo Ozawa v. U. S.*, 43 U. S. 65). The evidence therefore supports this particular charge appearing in the warrant.

The remaining charge in the warrant is that the alien was not exempted from the operation of the Immigration Act of 1924 by the terms of paragraph C, section 13 thereof. The section referred to provides that aliens ineligible to citizenship shall not be admitted to the United States unless they are members of certain classes of aliens specifically exempted. The alien herein at the time of entry was not a member of these classes specifically exempted. It follows therefore, that he is unlawfully in the United States under this third ground mentioned in the warrant.

The above grounds of deportation of course are predicated upon the fact that the alien entered the United States subsequent to July 1, 1924. As pointed out, *supra*, the alien has failed to show that he entered the United States prior to July 1, 1924, and having failed to show that his entry was before the date in question, appellee contends that the various grounds set forth in the warrant of deportation have been sustained.

REPLY TO PETITIONER'S BRIEF.

Counsel refers to two reasons why the Secretary of Labor had no authority to issue a warrant for appellant's deportation. We enumerate them and will refer to them in the order stated.

1. Counsel Contends That There Is No Evidence to Sustain the Warrant of Deportation.

In reply to this contention this Honorable Court's attention is respectfully directed to paragraph 4 of our argument as above set forth. Appellee therein has stated why in his opinion the three grounds for deportation as set forth in the warrant of deportation have been sustained.

Under the above heading counsel has expressed the belief that appellee will concede that if the alien in this case has resided in the United States for a period in excess of five years before institution of deportation proceedings that the period within which deportation may be effected has terminated. While in most cases the five-year limitation prevails as to aliens who can establish that they entered the United States prior to July 1, 1924, the limitation has no application to aliens who enter this country subsequent to July 1, 1924. Section 14 of the Act of 1924 above quoted testimony provides that any alien who enters the United States *at any time* after the passage of the act in question and who is thereafter found to have been at the time of entry not entitled under the act to enter the United States shall be taken into custody and deported. Having entered the United States since July 1, 1924, without an immigration visa, being an alien ineligible to citizenship at the time of his entry, and not being exempt under the paragraph of 13 (c) of the act, there is no time limit fixed within which the alien must be deported. Consequently the five-year limit referred to by counsel has no application to this alien's case.

Counsel contends, on page 7 of his brief, that the Immigration Service did not produce one word of testimony

or any other kind of evidence to dispute the alien's claim that he last entered the United States in February, 1920. In paragraph 2 of the argument appellee has pointed out why in his opinion the burden of showing that the alien entered the United States prior to July 1, 1924, is by law placed upon the alien. Appellee contends that the alien has not sustained the burden of proof required and contends further, as set forth in paragraph numbered 1 of the argument, why in his opinion the alien in the case at bar is not the Keizo Kamiyama referred to in the various exhibits filed by the alien as listed on pages 7 and 8 of counsel's brief.

On page 8 of his brief, counsel refers to the testimony of K. Nishimoto, which he contends corroborates the alien's testimony to residence in the United States prior to July 1, 1924. In the Immigration File will be found Exhibit "C," which consists of a photograph of the alien in the case at bar and certain testimony given relative to Keizo Kamiyama. On page 5 of Exhibit "C" will be found testimony of witness K. Nishimoto given November 23, 1928. On page 15 of the Immigration File will be found testimony given by this same witness on March 13, 1929, when he testified in behalf of the alien. It will be noted from Nishimoto's testimony of November 23, 1928, that the Keizo Kamiyama mentioned by witness was over 35 years of age. The witness Nishimoto was then 30 years old and he distinctly points out that the Keizo Kamiyama concerning whom he was then testifying was "older than I." On pages 8 and 9 of the Immigration File will be found the alien's testimony wherein he claims that he was at that time 24 years old, American reckoning, having been born in 1904. It will be noted further (see page 15

of Nishimoto's testimony appearing in Immigration File on March 13, 1929) that when the inspector asked witness this question with reference to the alien, "Is his name Keizo Kamiyama?" witness replied: "I think so." This attempt of the witness Nishimoto to identify the 24-year-old alien as the Keizo Kamiyama who had previously worked for him and was over 35 years of age, in the opinion of appellee, discredits the testimony of Nishimoto as to the real identity of the alien. Counsel contends, with reference to this so-called "positive testimony," that the Immigration Service cannot chose to disregard it where there is nothing to refute it and cites *U. S. Ex Rel Schachter v. Curran*, 4 Fed. (2d) 356. The question involved in that case was whether the alien had resided in South America for at least five years immediately preceding the time of his application for admission to the United States. If he had, under the Act of May 19, 1921, he was exempt from quota requirements. He was excluded at New York on the ground that he had come to the United States in excess of the Russian quota. No consideration was given by the excluding board to the question of the alien's residence in South America. In other words, the sole ground on which the alien claimed the right to enter the United States was ignored. On *habeas corpus* the District Court returned the case to the board that it might fully and completely set forth its determination upon the question of the alien's residence in South America for five years prior to his arrival in the United States and to whether the alien was entitled to consideration under the exception accorded aliens for a five-year residence in South America. The case was reopened by the board as it stated for the "correction of the record." Without further testimony the

board held it was "not satisfied from the evidence submitted that the alien had resided in Argentine for five years prior to his application for admission to the United States" and excluded him. The Circuit Court held, in sustaining *habeas corpus:*

> "There is nothing in the evidence to impeach the testimony of the alien to the effect that he had lived in La Plata continuously five years before leaving for the United States. The documentary evidence upon which he secured the visa of his passport was apparently not considered at all."

This documentary evidence was accessible to the board and the board chose to disregard it. The cited case differs materially from the case at bar. In the cited case no effort was made at the reopening to secure documentary or other evidence of the fact that the alien had lived in South America for five years. In that case the available evidence was disregarded. In the case at bar, however, there is something in the evidence to *impeach* the testimony given not only by the alien but by his witness Nishimoto. It is not a question of disregarding testimony and evidence. The immigration authorities simply did not believe the testimony nor did they believe the documentary exhibits referred to by the alien. We know of no rule which requires that the administrative authorities must believe all testimony presented to them in a case of this kind. On page 9 of his brief, counsel refers to certain discrepancies which he considers trivial. These discrepancies, appellee contends, are material as they refer to the question of the identity of the alien and as to this the age of the alien is certainly very material. While it is true the preliminary hearing accorded the alien on November 18, 1928, was

not made in the presence of counsel, that does not render the hearing unfair (*Chin Shee v. White*, 273 Fed. 801; *Plane v. Carr*, 19 Fed. (2d) 470, and *ex parte Kishimoto*, 32 Fed. (2d) 991, all of which cases were decided by CCA 9th.)

For the foregoing reasons it is believed that counsel's first contention that there is no evidence to sustain the warrant of deportation is untenable.

2. Counsel Contends That the Alien Was Not Given a Fair Hearing.

Counsel points out four reasons why he considers the hearing unfair. We will discuss these reasons numerically.

First: He was arrested without a warrant and interrogated while confined incommunicado and without bail. In our statement of facts we have recited the circumstances surrounding the arrest of the alien. While recognizing the right of the government to arrest and deport aliens under certain conditions, yet counsel contends, on pages 11, 12 and 13 of his brief, that there is nothing in the Immigration Act or in the Department of Labor Rules authorizing an immigrant inspector to take an alien into custody without warrant. Counsel cites the Act of February 27, 1925 (8 U. S. C. 110) as limiting the power of employees of the Bureau of Immigration to arrest aliens without warrant as to those cases where the alien is seen in the act of surreptitiously entering the United States. The primary purpose of the act referred to was to confer upon members of the recently organized border patrol the right to take aliens into custody. For years prior to that date the right of regularly appointed immigrant inspectors to take aliens into custody without warrant, when

said inspectors had reason to believe such aliens were unlawfully within the United States, seems not to have been seriously questioned. Subdivision F of Rule 27 was promulgated subsequent to the passage of the Act of February 27, 1925. Paragraph 3 of that rule reads as follows:

> "Wherever there is any likelihood that an alien who has succeeded in effecting unlawful entry will leave for parts unknown before a formal warrant of arrest can be obtained, request for the issuance of a warrant should be made by telegraph, using the departmental code for the purpose; and immediately upon receipt of such telegraphic warrant, examination of said alien thereunder as to his right to be and remain in the United States shall be proceeded with as provided in Sub-Division D of Rule 18."

Clearly the rule contemplates holding in custody any alien apprehended after unlawful entry until formal warrant of arrest is received where there is likelihood that the alien will leave for parts unknown. In the case at bar the alien admitted unlawful entry and if he had not been held by the inspector, there was every reason for the inspector to believe that the alien would depart for parts unknown. A similar issue regarding the question of arrest was raised by counsel in the case of *Ex parte Ematsu Kishimoto,* 32 Fed. (2d) 991, decided by this Honorable Court.

Counsel refers to *Bilokumsky v. Tod*, 263 U. S. 149, on page 14 of his brief and infers therefrom that taking a statement from an alien unlawfully held is tantamount to unlawful search and seizure. Appellee contends that under the circumstances of appellant's case, he was lawfully held for he admitted entry without inspection, and at no place in the record subsequently made is it contended

by appellant that his entry into the United States was lawful.

Counsel cites on page 14 of his brief the case of *Charley Hee v. U. S.*, 19 Fed. (2d) 335, which cannot be construed, appellee believes, as authority for considering appellant's statement of May 17, 1928, as having been unlawfully secured. The Charley Hee case was a judicial proceeding. The distinction between a judicial and an administrative proceeding is clearly set forth in *Lew Guy v. Tillinghast* 24 Fed. (2d) 825. Lew Guy and certain other Chinese aliens were apprehended July 30, 1927, and preliminary statements were immediately taken from them. On August 2, 1927, warrants of arrest were issued by the Secretary of Labor and hearings held under authority of such warrants. At those hearings, over objection of the attorney representing the Chinese aliens, their preliminary statements were read to them and made a part of the record. In denying their petitions for writs of *habeas corpus* the court held:

> "The authority to deport these aliens, pursuant to Section 19 of the Immigration Act of February 5, 1917, * * * cannot be questioned. Ng Fung Ho vs. White, 259 U. S. 276. * * * All decisive questions involved in these proceedings are disposed of in Ng Fung Ho vs. White, *supra*. It is intimated that the government has accepted as good law the dissenting opinion of Judge Anderson in Charles Hee vs. U. S., 19 Fed. (2d) 335, and that therefore the use of the preliminary statement at the administrative hearing upon the deportation warrant offers grounds for declaring the hearing unfair. With this contention I cannot agree. Judge Anderson was dealing with judicial proceedings and not executive proceed-

> ings and it has recently been held in this Court that administrative officials are not bound by strict rules of evidence. Johnson v. Kock Tung, (CCA) 3 Fed. (2d) 889; Moy Said Ching vs. Tillinghast, (CCA) 21 Fed. (2) 810."

The case of appellant herein is fundamentally identical with the Lew Guy case and appellee respectfully contends that the statement of November 17 1928, should not be considered as unlawfully secured. (See, also, *Chan Wong v. Nagle*, (CCA 9) 17 Fed. 2, 987.)

Second: Evidence was received outside the trial and outside the presence of the accused and without notifying him or his counsel. Under this heading counsel refers to the Japanese photograph and testimony filed in the Immigration record as Exhibit "C." The testimony incorporated in Exhibit "C" was secured when neither counsel or appellant were present. On page 6 of the hearing of January 25, 1929, (see Immigration File) when an attempt was made on the part of the examining inspector to introduce Government Exhibit "C" counsel objected on the ground that the testimony was hearsay and its introduction was in violation of his client's constitutional rights. After this objection was interposed the hearing was adjourned until 2:55 p. m. this date. If this Honorable Court will refer to page 6 of the above hearing of January 25, 1929, it will be seen that counsel withdrew his objection and Government Exhibit "C" and the photograph and transcript of testimony were permitted to remain in the record without further objection. Moreover, at the hearing of January 25, 1929, appellant was not denied the right to cross-examine the witness whose testimony appears in Government Exhibit "C." Appellant

called one of these witnesses himself, to-wit: K. Nishimoto. Appellee would have been compelled to subpoena the other witnesses whose testimony appears in Government Exhibit "C" if appellant had requested that those witnesses be present in order that counsel might cross-examine them. However, in view of the fact that counsel withdrew his objection to the introduction of Exhibit "C" appellee contends that counsel cannot at this time consistently urge that it was unfair to permit the introduction of the exhibits in question. On page 21 of his brief, counsel cites certain cases which hold that an alien has a right to be confronted with the witnesses against him; has a right to be notified of the time and place of hearing and has a right to cross-examine witnesses who appear in behalf of the government. We do not dispute the correctness of those cases and if the government had refused to accord the alien these rights there might be some just ground for his contention that the hearing was unfair. However, the introduction into evidence of statements made by witnesses who are not thereafter produced for cross-examination does not necessarily render the proceeding invalid if the alien is given a full opportunity to rebut this evidence produced against him. That theory is clearly set forth in the decision by this Honorable Court in the case of *Yip Wah v. Nagle*, 7 Fed. (2d) 426. Of course, it is well established that the rules of evidence and of procedure applicable in judicial proceedings need not be strictly followed in deportation cases nor is the hearing invalid because some evidence has been improperly rejected on receipt. *U. S. Ex rel Bilokumpsky v. Tod*, 263 U. S. 149, 157.

Counsel refers, on page 21 of his brief, to the case of *Ex parte Bunji Une*, 41 Fed. (2d) 239, with reference to the presentation of a photograph to the various witnesses and having them attempt to identify the alien from that photograph. As to this allegation it is to be noted that the photograph complained of in the case at bar is an integral part of Government's Exhibit "C" and objection to the introduction of this exhibit was withdrawn by counsel. The entire exhibit was properly in evidence, therefore, and the explanation as to counsel's motive for withdrawing his objection to the introduction of Exhibit "C" (see page 22 of counsel's brief) is not entitled to serious consideration.

Third: Records and testimony taken in other cases were used against the alien without giving him the opportunity to cross-examine the witnesses therein or to explain or rebut their testimony.

Under this heading counsel discusses a certain letter dated May 9, 1929, and written by Inspector in Charge C. G. Gatley of the San Pedro Immigration Office. (This letter is incorporated in the Immigration File.) In that letter the inspector in charge reviewed the testimony and made comment upon certain other cases involving Japanese aliens in deportation proceedings. As a letter of transmittal it became a part of the record in this case, but is no more to be considered as evidence against the appellant herein than a brief would be considered as evidence. It does not purport to be evidence and its introduction into the record should be in no way construed as unfair to this appellant. At the conclusion of the letter in question the inspector in charge recommended the alien's deportation.

He had a right to make such a recommendation despite the recommendation of M. H. Scott, the examining inspector. Immigration Rule 18, paragraph 5, subdivision D of the Immigration Rules of March 1, 1927, which were in effect when the hearing against the alien was held, distinctly provide that the officer in charge shall recommend to the Secretary of Labor whether or not a warrant of deportation shall issue. It is felt, therefore, that the letter complained of should not be held as unfair to the alien.

Fourth: Anonymous communications were considered in evidence without giving the alien the opportunity of seeing, explaining or rebutting them.

While anonymous communications are referred to on page 10 of counsel's brief, and on page 26 thereof, but one such anonymous communication is complained of and that is printed in its entirety on page 26 of counsel's brief. The communication complained of was transmitted to appellee by the inspector in charge at San Pedro under cover of the latter's letter of May 9, 1929. It will be noted that this anonymous letter was dated April 25, 1925, and was not received by the San Pedro Immigration Office until April 30, 1929, which was after final hearing of the appellant had been concluded, for it will be noted (see page 17 of the hearing in the Immigration File) that the testimony was closed and the examining inspector's recommendation was made on March 13, 1929. It cannot be contended, therefore, that the anonymous letter of April 25 in any way influenced the recommendation of the examining inspector, nor may it be urged successfully that the communication in any way influenced the finding of

the Board of Review in Washington. There is nothing in the finding of the board to indicate that it in any way considered the letter complained of. Had the letter contained independent grounds for deportation and had such grounds been relied upon, there would be justification for the charge of unfairness. But the letter contained data which had been developed already during the examination of the appellant and at most did nothing more than corroborate facts developed during the hearing. This case differs from that of *Chew Hoy Quong v. White*, (CCA 9th, 1918) 247 Fed. 869, cited by counsel on page 28 of his brief. The report in that case indicates that certain confidential information contained in a confidential communication was forwarded to the Secretary of Labor to be considered by him on appeal. Apparently the communication was considered by the Secretary of Labor in reaching his decision in the matter. For the reason that nothing in the letter apparently affected the decision of the Board of Review, it is the belief of appellee that the case at bar is not on all fours with *Chew Hoy Quong v. White*. The case at bar is similar to that of *Ghiggeri v. Nagle*, decided by this Honorable Court and reported in 19 Fed. (2d) 875. In that case a letter from a police officer in San Francisco was received in evidence in a deportation proceeding, but apparently was not considered by the Board of Review in Washington or by the Secretary of Labor, nor did it affect their decision in that case. This Honorable Court held:

> "It is well settled that a warrant of deportation is not necessarily rendered void by the reception of incompetent evidence." U. S. v. Tod, 263 U. S. 149, 157; Tong Tun v. Edsell, 223 U. S. 673, 681; U. S. v. Curran, CCA 12 Fed. (2d) 636.

In view of the circumstances involved and of the decisions just cited, we make no special reference to the cases cited by counsel on page 27 of his brief.

Conclusion.

Appellee respectfully contends that this appeal should be dismissed and that appellant should be remanded for deportation for the reasons that:

1. The alien herein is not the Keizo Kamiyama who was domiciled in the United States prior to July 1, 1924.

2. The alien has not shown that he resided in the United States prior to July 1, 1924, and under the law it is presumed he entered subsequent to that date.

3. That the warrant hearing resulting in the order of deportation was a fair hearing.

4. That the evidence sustains the warrant of deportation.

Respectfully submitted,

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